No. 85-2099

IN THE

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DOROTHY FINLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, SOUTH CAROLINA, VIRGINIA, WISCONSIN, WYOMING

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QUESTION PRESENTED

Does an indigent criminal defendant's sixth amendment right to a meaningful first appeal pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), extend to state court collateral review proceedings?

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INTEREST OF AMICI CURIAE

Surely no fair-minded persons will contend that those who have been deprived of their liberty without due process ought nevertheless to languish in prison.[1]

All litigation must come to an end at some time.[2]

[1] *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963).

[2] *Etheridge v. State*, 240 Ind. 384, 386, 164 N.E.2d 642, 644 (1960).

The foregoing statements disclose the tension inherent in the law regarding collateral attacks on criminal convictions. On one hand, society deems liberty to be of transcending value.[3] The "wrongful" deprivation of liberty merits curative action and the process used to deprive one of liberty includes corrective process after "final" judgment. On the other hand, the state and society have an interest in attaching finality to criminal judgments. The specter of endless attacks on a criminal judgment generates distaste because of the potential for abuse and because such a process may undercut legitimate state interests.

Indeed, the number of criminal post-conviction appeals to already overburdened courts has grown substantially. A significant part of this increase is due to greater accessibility of the appellate procedure to indigents. Consequently, in some cases, courts have been confronted with post-conviction appeals that present frivolous issues for review from indigents who have nothing to lose by appealing.[4] These frivolous indigent appeals present problems for the court-appointed attorney. Appointed counsel must balance the potentially conflicting duties to zealously represent the indigent while not presenting frivolous arguments to the court.

In *Anders v. California*, 386 U.S. 738, 739, 87 S.Ct. 1396, 1397 (1967), the Supreme Court considered the "extent of the duty of a court-appointed appellate counsel to prosecute a *first appeal* from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal" (emphasis supplied). The *Anders* opinion has been interpreted as requiring that a request to withdraw be accompanied by a brief referring to anything in the record that might support the appeal. The

[3] *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970).

[4] *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963) (Clark, J., dissenting).

amici curiae submit that since an indigent has no constitutional right to post-conviction review, the Pennsylvania Superior Court erroneously extended the *Anders* direct appeal requirement to post-conviction proceedings; that the application of *Anders* to post-conviction review has created a disservice to appellate counsel, appellate courts, and criminal appellants; and that a "no-merit" letter is a sufficient alternative which would comport with the dictates of equal protection and with an attorney's ethical responsibilities to both court and client.

STATEMENT OF THE CASE

In 1975, the Respondent, represented by appointed counsel, was convicted of second-degree murder. Following an appeal, the Pennsylvania Supreme Court affirmed the Respondent's conviction. Subsequently, the Respondent, *pro se*, filed a petition for post-conviction relief in the Philadelphia Court of Common Pleas which alleged the same issues previously rejected by the state supreme court on direct appeal. Consequently, the Court of Common Pleas summarily denied the petition without the appointment of counsel and a hearing.

Nevertheless, the Respondent, by counsel, appealed to the Pennsylvania Supreme Court. While her appeal did not set forth any substantive claims of error, the Respondent successfully argued that the Court of Common Pleas erred by summarily denying the petition for post-conviction relief without appointing counsel. The Pennsylvania Supreme Court remanded the case to the Court of Common Pleas with instructions to determine whether the Respondent was indigent and, if so, to appoint counsel for proceedings under the state post-conviction hearing act. As a result, the Court of Common Pleas appointed counsel. After reviewing the record of proceedings and conferring with the Respondent, counsel concluded that there was no basis for collateral relief. Counsel advised the Court of Common Pleas of his determination, by means of a letter, and requested to withdraw from the case.

Subsequently, the Court of Common Pleas reviewed the case and not only concluded that the record of proceedings was devoid of meritorious issues under the state post-conviction hearing act, but also refused to compel counsel to present frivolous collateral claims. Thus, the Court of Common Pleas permitted counsel to withdraw and dismissed the Respondent's petition for post-conviction relief. The Respondent, however, by appointed counsel, appealed the dismissal to the Pennsylvania Superior Court which remanded the case for further post-conviction proceedings on the ground that prior post-conviction counsel failed to comply with requirements set forth in *Anders v. California* 386 U.S. 738, 87 S.Ct. 1396 (1967).

SUMMARY OF THE ARGUMENT

The procedures set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) do not extend to state court collateral review proceedings.

ARGUMENT

In *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), the Supreme Court addressed the duty of a court-appointed attorney to prosecute a first appeal from a criminal conviction. In the opinion, the Supreme Court briefly reviewed a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956), regarding the necessity of providing a transcript for indigent defendants on appeal, through *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), regarding appointment of counsel on appeal, and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963) regarding the right to the assistance of counsel.

Anders is premised on the proposition that a criminal defendant has a right to counsel on first appeal. Consequently, since there is no right to counsel in pursuing either state or federal discretionary appeals, *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974), there is no right to counsel on collateral review. *Bounds v. Smith*, 430 U.S.

817, 839, 97 S.Ct. 1491, 1504 (1977). Accordingly, there is no basis for granting the *Anders* protections to criminal defendants pursuing collateral review proceedings. *United States ex rel. Curtis v. People of State of Illinois*, 521 F.2d 717, 720 (7th Cir. 1975).[5]

In addition, in *Anders*, the Supreme Court set forth strict requirements to be followed when counsel determines, in good faith, that the defendant's appeal is frivolous. Generally, the procedure requires the attorney to inform the court of his belief that the appeal lacks merit, to request permission to withdraw, and to submit a brief referring to anything in the record that might arguably support the appeal. This procedure is a disservice to appellate counsel, appellate courts, and criminal defendants.

Anders creates several problems for appellate counsel. First, counsel's ethical obligations compel him to refrain from asserting frivolous claims. Indeed, counsel who fully believes a case to be frivolous cannot, while requesting leave to withdraw, be an advocate for reversal of the conviction. Second, if counsel discovered anything in the record that might arguably support the appeal, he would not have sought permission to withdraw.[6] If counsel, however, is convinced that the case is frivolous, references to the record and to legal authority amount to a brief against his client.[7]

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[5] Also, in *State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154, 157 (1984), the Supreme Court noted:

> Since we are not required to accept petitions for review in *Anders* type cases, we do not invite them. The system is strained to the point that we cannot afford the luxury of repeated review of trivia or issues of small merit. The time available to prosecutors, defenders, judicial staff, and judges must be devoted to issues of substance.

[6] *Anders*, 386 U.S. at 747, 87 S.Ct. at 1401 (dissenting opinion).

[7] *Hermann*, Frivolous Criminal Appeals, 47 N.Y.U.L. Rev. 701, 711-712 (1972).

Moreover, *Anders* poses difficulties for appellate courts. *Anders* requires that an appellate court abandon its traditional role as an adjudicatory body and enter the appellate arena as an advocate.[8] This process not only places an enormous burden on the appellate courts, but also creates an anomaly: an appellate court must search the record for error when counsel has found none, although it need not do so when counsel finds and argues one claim of error. In *People v. Wende*, 87 Cal. App. 3d 389, 150 Cal. Rptr. 840 (1979) rev'd, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 843, 600 P.2d 1071, 1075 (1980), the court noted:

> ... under this rule counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues then when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation.

Anders does not explain why such a review is required by due process, equal protection, the right to counsel, or any other constitutional provision. An indigent appellant certainly has the same right to present an appeal as one who is not indigent, but it is not clear why an indigent should have a right to a more comprehensive appeal process than a non-indigent.

Further, the most significant problem in applying *Anders* in post-conviction relief cases is that the hardships it imposes upon appointed counsel and appellate courts are unnecessary to vindicate constitutional principles. In *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974), the Supreme Court noted that even though the constitutional basis for the *Griffin* and *Douglas* line of cases is found in the due process and equal protection clauses, the due process rights

[8] *Anders* has been interpreted to require that the appellate court review the entire record to determine whether the appeal is, in fact, frivolous. *See, e.g. United States v. Jackson*, 578 F.2d 1162 (5th Cir. 1978); *State v. Porter*, 125 Ariz. 355, 609 P.2d 1055 (1980).

of a convicted defendant are not really so compelling as those which exist before a determination of guilt has been made.[9] In *Ross*, the Supreme Court stated that the fact that an appeal has been provided does not require the state to provide counsel to indigent defendants at every step of the procedure. *Ross*, 417 U.S. at 611-612, 94 S.Ct. at 2444-2445. Moreover, after ruling that the state is not required to provide counsel at state expense for discretionary appeals to the state supreme court, the Supreme Court noted:

> And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

417 U.S. at 616, 94 S.Ct. at 2446.

Accordingly, the requirements of due process and equal protection do not mandate the application of *Anders* to post-conviction review proceedings. The basic necessities for a criminal appeal are a transcript of the record of proceedings, or an equivalent alternative, and a competent attorney to examine both the record and the law conscientiously as an advocate for the appellant. Counsel should, and must, raise whatever issues "arguably support the appeal," including arguments for change in established law when a basis for advocating such change exists. If, following conscientious examination of the case, appointed counsel determines that there are no non-frivolous issues to present on appeal, counsel should so notify the court and

[9] In *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913 (1894), the Supreme Court ruled that the state need not provide any appeal from a criminal conviction.

appellant. The right to counsel does not require appointed counsel to present frivolous issues to an appellate court.[10]

Finally, the amici curiae submit that a "no merit" letter is an adequate alternative to the *Anders* brief for purposes of state collateral review proceedings. In *Nickols v. Gagnon*, 454 F.2d 467 (7th Cir. 1971), the court ruled that the *Anders* decision was inapplicable in a situation where a "no merit" letter, prepared by appointed counsel, was not a mere "conclusory statement," but included a reasoned exposition of the basis for his conclusion. Indeed, *Anders* does not require that a petition to withdraw be accompanied by a brief *arguing* anything in the record that might support the appeal. Further, the word "brief", itself, does not necessarily connote an adversarial presentation of points that are demonstrably without merit. Rather, the term, "brief," connotes "a 'professional exposition of all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of an appeal." *Nickols v. Gagnon*, 454 F.2d at 471.

The concerns of the Supreme Court in *Anders* would be served by a "no merit" letter, as in *Nickols*, since the letter would reflect the kind of professional analysis which a trained advocate might make as a predicate to the preparation of an appellate brief. Requiring counsel to refer to only those issues which might support an appeal, removes counsel from the "quixotic" position of marshalling support for issues which he has concluded to be frivolous. *Anders v. California*, 386 U.S. 739, 747, 87 S.Ct. 1396, 1401 (dissenting opinion).

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[10] Indeed, the right to counsel does not even require that appointed counsel present all non-frivolous issues to an appellate court. *Jones v. Barnes*, 463 U.S. 742, 103 S.Ct. 3308 (1983).

CONCLUSION

For the foregoing reasons, the decision of the Pennsylvania Superior Court should be reversed.

Respectfully submitted,

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